

REMARKS

Entry of the foregoing amendments is respectfully requested.

Summary of Amendments

By the foregoing amendments claims 12, 36 and 49 are amended and claims 51-55 are added, whereby claims 12-17, 19, 20, 23, 24, 26, 32, 33, 35-37 and 41-55 will be/remain pending, with claims 12, 36, 41 and 44 being independent claims.

The present amendments find support throughout the present specification (see, e.g., pages 22 and 31 thereof).

Summary of Office Action

Claims 12-17, 19, 20, 23, 24, 26, 32, 33 and 35-37 stand rejected under 35 U.S.C. § 112, second paragraph, as being indefinite for allegedly failing to particularly point out and distinctly claim the subject matter which Applicants regard as the invention.

Claims 12-17, 19, 20, 32, 33, 35 and 45 stand rejected under 35 U.S.C. § 103(a) as allegedly being obvious over McGee et al., U.S. Patent No. 5,585,343 (hereafter "McGEE") in view of Hawley's Condensed Chemical Dictionary, entry Dibutyl Phthalate.

Claims 12, 16, 17, 20, 23, 24, 26, 20-33 (?) and 35 stand rejected under 35 U.S.C. § 102(b) as allegedly being anticipated by or, in the alternative, under 35 U.S.C. § 103(a) as allegedly being unpatentable over Henkel KGaA, DE 4,318,171 (hereafter "HENKEL I") as evidenced by the translation thereof as PTO-98-1147 and Derwent Abstract, AN 1995-014884.

Claims 12-17, 19, 20, 23, 24, 26, 32, 33, 35-37 and 41-50 stand/are rejected under 35 U.S.C. § 103(a) as allegedly being unpatentable over HENKEL I in view of translation thereof as PTO-98-1147 and Derwent Abstract, AN 1995-014884, Rosano, U.S. Patent No. 4,146,499 (hereafter "ROSANO"), Hoppe et al., U.S. Patent No. 4,839,165 (hereafter "HOPPE"), Unilever PLC, EP 560 516 (hereafter "UNILEVER") and/or The Procter & Gamble Company, EP 616 027 (hereafter "P & G").

Claims 12, 16, 17, 20, 23, 24, 26, 20-33 (?) and 35 stand rejected under 35 U.S.C. § 102(a) (?) as allegedly being anticipated by or, in the alternative, under 35 U.S.C. § 103(a) as allegedly being unpatentable over Henkel KGaA, DE 4,337,041 (hereafter "HENKEL II") as evidenced by Derwent Abstract, AN 1995-171245.

Claims 12-17, 19, 20, 23, 24, 26, 32, 33, 35-37 and 41-50 stand/are rejected under 35 U.S.C. § 103(a) as allegedly being unpatentable over HENKEL II in view of Derwent Abstract, AN 1995-171245, ROSANO, HOPPE, UNILEVER and/or P & G.

Response to Office Action

Reconsideration and withdrawal of the rejections of record are respectfully requested in view of the foregoing amendments and the following remarks.

Response to Rejection under 35 U.S.C. § 112, Second Paragraph

Claims 12-17, 19, 20, 23, 24, 26, 32, 33 and 35-37 stand rejected under 35 U.S.C. § 112, second paragraph, as being indefinite for allegedly failing to particularly point out and distinctly claim the subject matter which Applicants regard as the invention.

Although it is Applicants' position that this rejection is unwarranted for the reasons set forth in the responses to the previous Office Actions, merely in order to advance the present application to allowance, Applicants have editorially amended independent claims 12 and 36 (and dependent claim 49) in a way which should make it absolutely clear that there is no inconsistency with respect to the composition of the oil phase recited in claims 12 and 36.

In view of the foregoing, Applicants again respectfully request that the rejection of claims 12-17, 19, 20, 23, 24, 26, 32, 33 and 35-37 under 35 U.S.C. § 112, second paragraph, be withdrawn.

Response to Rejection of Claims under 35 U.S.C. § 103(a) over McGEE

Claims 12-17, 19, 20, 32, 33, 35 and 45 stand rejected under 35 U.S.C. § 103(a) as allegedly being obvious over McGEE in view of Hawley's Condensed Chemical Dictionary, entry Dibutyl Phthalate. The rejection is a repetition of the rejection set forth in the Final Office Action mailed November 2, 2007.

This rejection is again respectfully traversed for all of the reasons which have been set forth in the responses to the previous Office Actions (which reasons are incorporated herein in order to avoid too much repetition). Regarding the counterarguments set forth in the response to the November 2, 2007 Office Action and the Advisory Action mailed January 17, 2008, the Examiner again has failed to give any reason as to why it would allegedly have been obvious to one of ordinary skill in the art to incorporate one or more of the components of the oil phase recited in, for example, present claim 12 (i.e., an ester of an alkanecarboxylic acid with a chain length of from 3 to 30 carbon atoms and an alcohol with a chain length of from 3 to 30 carbon atoms, a C₁₂₋₁₅-alkyl benzoate, a hydrocarbon wax, a dialkyl ether, cyclomethicone, and hexamethylcyclotrisiloxane) into the

perfume formulations of McGEE. In this regard, the Examiner appears to point to the presence of sodium laureth sulfate, hydrocarbons and fatty alcohols, which presence allegedly is contemplated by McGEE (see paragraph bridging pages 4 and 5 of the present Office Action). However, these compounds apparently do not belong to any of the classes of compounds which are recited in claim 12 as components of the oil phase.

With respect to the comments in section 17 at page 9 of the present Office Action Applicants note that the Examiner appears to take the position that a deodorant reads on the perfume formulations of McGEE. However, McGEE clearly fails to mention deodorants and neither has the Examiner provided any evidence that sprayable perfume formulations such as those taught by McGEE are commonly considered to be, or include deodorants.

The Examiner also has failed to provide any written (or other) support for the allegation that men's cologne "commonly includes an astringent" (see top of page 10 of the present Office Action).

It further is noted that the Examiner takes the position that a deterative surfactant "is indistinct from the other emulsifiers in the composition and thus not patentable". However, the Examiner has not provided any evidence that the polyethoxylated emulsifiers, polypropoxylated emulsifiers, and polyethoxylated and polypropoxylated emulsifiers recited in claim 12 are generally considered to have a deterative action or are commonly employed in deterative compositions respectively.

Applicants further point out that there is no apparent reason for one of ordinary skill in the art to incorporate a sunscreen in the perfume formulations of McGEE (see e.g., claim 15), and neither has the Examiner provided any explanation in this regard.

Applicants submit that for at least all of the foregoing reasons and the additional reasons set forth in the responses to the previous Office Actions, the rejection of claims 12-17, 19, 20, 32, 33, 35 and 45 under 35 U.S.C. § 103(a) over McGEE is unwarranted and should be withdrawn, which action is again respectfully requested.

Response to Rejection of Claims under 35 U.S.C. § 102(b)/103(a) over HENKEL I

Claims 12, 16, 17, 20, 23, 24, 26, 20-33 (?) and 35 stand rejected under 35 U.S.C. § 102(b) as allegedly being anticipated by or, in the alternative, under 35 U.S.C. § 103(a) as allegedly being unpatentable over HENKEL I as evidenced by the translation thereof as PTO-98-1147 and Derwent Abstract, AN 1995-014884. The rejection is a repetition of the rejection set forth in the Final Office Action mailed November 2, 2007.

Applicants again respectfully traverse this rejection for all of the reasons which have been set forth in the responses to the previous Office Actions (which reasons are incorporated herein in order to avoid too much repetition).

From the comments in section 19 of the present Office Action it is noted that the Examiner takes the position that there is an overlap between the range of the droplet diameter of the PIT emulsions of HENKEL I (order of magnitude of 100-300 nm) and the range of the particle diameter recited in claim 12 (from about 10^{-2} μm to about 10^{-1} μm = about 10-100 nm). Applicants respectfully disagree with the Examiner in this regard. Specifically, it is apparent that the particles (droplets) in an emulsion are not all of the same size but that there is a distribution of particle (droplet) sizes within a certain range. While both the PIT emulsions of HENKEL I and the present microemulsions may comprise particles (droplets) having a diameter of about 100 nm they differ in the diameters of

the remaining particles (droplets), i.e., in the PIT emulsions of HENKEL I droplets having a diameter of about 100 nm belong to the smallest droplets present (the remaining droplets having diameters of up to about 300 nm), whereas in the present microemulsions particles having a diameter of about 100 nm belong to the largest particles present. Accordingly, the corresponding emulsions are clearly distinguishable.

In section 20 of the present Office Action, responding to Applicants' argument that the cosmetic compositions (aqueous preparations) of HENKEL I would not be (based on) microemulsions, the Examiner takes the position that the present claims "only refer to a maximum amount of emulsifier in the compositions and are otherwise silent on the concentrations of the remaining ingredients". In this regard, Applicants point out that present claim 12, for example, clearly recites that the cosmetic preparation is a ... microemulsion. Accordingly, there can be no doubt that the cosmetic preparation of claim 12 differs significantly from the cosmetic compositions of HENKEL I, which compositions comprise only a small percentage of the PIT emulsions described therein.

Applicants submit that for at least all of the foregoing reasons and the additional reasons set forth in the responses to the previous Office Actions, HENKEL I neither anticipates nor renders obvious the subject matter of any of the present claims. In view thereof, the rejection of claims 12, 16, 17, 20, 23, 24, 26, 20-33 and 35 under 35 U.S.C. § 102(b)/103(a) over HENKEL I is unwarranted and should be withdrawn, which action is again respectfully requested.

***Response to Rejection of Claims under 35 U.S.C. § 103(a) over HENKEL I in View of
DERWENT, ROSANO, HOPPE, UNILEVER and/or P & G***

Claims 12-17, 19, 20, 23, 24, 26, 32, 33, 35-37 and 41-50 stand/are rejected under 35 U.S.C. § 103(a) as allegedly being unpatentable over HENKEL I in view of translation thereof as PTO-98-1147 and Derwent Abstract, AN 1995-014884, ROSANO, HOPPE, UNILEVER and/or P & G. The rejection is a repetition of the rejection set forth in the Final Office Action mailed November 2, 2007.

Applicants again respectfully traverse this rejection for all of the reasons which have been set forth in the responses to the previous Office Actions (which reasons are incorporated herein in order to avoid too much repetition).

Regarding the comments in sections 21 and 22 of the present Office Action, Applicants are aware that “[t]he KSR decision forecloses the argument that a specific teaching, suggestion, or motivation is required to support a finding of obviousness”. However, the KSR decision also holds that “[a] patent composed of several elements is not proved obvious merely by demonstrating that each of its elements was, independently, known in the prior art. Although common sense directs one to look with care at a patent application that claims as innovation the combination of two known devices according to their established functions, it can be important to identify a reason that would have prompted a person of ordinary skill in the relevant field to combine the elements in the way the claimed new invention does.” *KSR Int’l Co. v. Teleflex Inc.*, 127 S. Ct. 1741. Emphases added. KSR further holds that often, it will be necessary to look to interrelated teachings of multiple patents; the effects of demands known to the design community or present in the marketplace; and the background knowledge possessed by a person having ordinary skill in the art to determine whether there was an apparent reason to combine the known elements in the fashion claimed by the patent at issue. This analysis should be made explicit. There must be some articulated reasoning with some

rational underpinning to support the legal conclusion of obviousness. *KSR Int'l Co. v. Teleflex Inc.*, 127 S. Ct. 1727, 1740-1741.

What the Examiner appears to essentially have done is to identify the components of the claimed preparations which are not disclosed in HENKEL I and then try to find documents relating to any cosmetic compositions (or to compositions which are arguably somewhat related to cosmetic compositions, see, e.g., P & G) which disclose one or more of the components which are missing from the disclosure of HENKEL I.

In other words, the Examiner appears to have tried to “reverse engineer” the claimed subject matter from the disclosures of HENKEL I and the secondary references, without providing any reason as to why, at the time of the present invention, one of ordinary skill in the art who wanted to modify (improve) the compositions of HENKEL I would have had an apparent reason to consult the cited secondary documents and to pick and choose those components from the laundry lists of components disclosed therein which are missing from the disclosure of HENKEL I. Applicants respectfully submit that this is clearly not the way that is prescribed by the KSR decision for determining whether or not claimed subject matter was obvious to one of ordinary skill in the art at the time the invention was made.

It is submitted that for at least all of the foregoing reasons and the additional reasons set forth in the responses to the previous Office Actions, the rejections of claims 12-17, 19, 20, 23, 24, 26, 32, 33, 35-37 and 41-50 under 35 U.S.C. § 103(a) over HENKEL I in view of DERWENT, ROSANO, HOPPE, UNILEVER and/or P & G are without merit, wherefore withdrawal thereof is respectfully requested again.

Response to Rejections of Claims under 35 U.S.C. § 102(a)/103(a) over HENKEL II and under 35 U.S.C. § 103(a) over HENKEL II in View of DERWENT, ROSANO, HOPPE, UNILEVER and/or P & G

Claims 12, 16, 17, 20, 23, 24, 26, 20-33 (?) and 35 stand rejected under 35 U.S.C. § 102(a) (?) as allegedly being anticipated by or, in the alternative, under 35 U.S.C. § 103(a) as allegedly being unpatentable over HENKEL II as evidenced by Derwent Abstract, AN 1995-171245. Claims 12-17, 19, 20, 23, 24, 26, 32, 33, 35-37 and 41-50 stand/are rejected under 35 U.S.C. § 103(a) as allegedly being unpatentable over HENKEL II in view of Derwent Abstract, AN 1995-171245, ROSANO, HOPPE, UNILEVER and/or P & G.

The present Office Action does not give any specific reasons for these rejections and merely indicates that the basis for the rejection is essentially as set forth for HENKEL I.

Applicants again respectfully traverse these rejections for all of the reasons which have been set forth above and in the responses to the previous Office Actions (which reasons are incorporated herein in order to avoid too much repetition).

Regarding the additional comments in section 23 of the present Office Action, Applicants again point out that the present independent claims recite a particle diameter in the range from about 10^{-2} μm to about 10^{-1} μm (= about 10-100 nm), thereby clearly distinguishing them from the PIT emulsions of HENKEL II which are merely indicated to (presumably) have “droplet diameters of below 1 μm ” (1000 nm). The Examiner still has not provided any evidence which would make it likely that the PIT emulsions of HENKEL II have droplet diameters within the range from about 10 nm to about 100 nm and not, for example, a droplet diameter of from 100-300 nm as disclosed in HENKEL I. At any rate, as in the case of HENKEL I, the PIT emulsions of HENKEL II are only intermediates for cosmetic preparations.

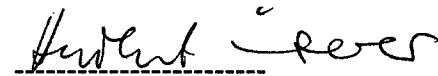
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Applicants submit that for at least all of the foregoing reasons and the additional reasons set forth in the responses to the previous Office Actions, withdrawal of the rejections under 35 U.S.C. § 102(a)/103(a) based on HENKEL II and ROSANO, HOPPE, UNILEVER and/or P & G is warranted and again respectfully requested.

CONCLUSION

In view of the foregoing, it is believed that all of the claims in this application are in condition for allowance, which action is respectfully requested. If any issues yet remain which can be resolved by a telephone conference, the Examiner is respectfully invited to contact the undersigned at the telephone number below.

Respectfully submitted
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